April 05, 2002

William F. Caton, Acting Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Room TW-B204
Washington DC 20554

Re: ***FCC Docket No. 01-338, CC Docket No. 96-98, CC Docket No. 98-147, FCC 01-361/ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,***

Initial Comments of the Illinois Commerce Commission

Dear Mr. Caton:

On December 20, 2001, the Commission released a Notice of Proposed Rulemaking ("NPRM") in the above-captioned matter. The Commission seeks comment generally on establishing a framework to reflect comprehensively the technological advances and marketplace changes that have taken place in the interim between the issuance of the *UNE Remand Order* and the present. Specifically, the Commission invites comment on whether it should adopt a more granular approach to its unbundling analysis under section 251 and on the identification of specific unbundling requirements for ILECs. In particular, the FCC seeks comment on whether it should consider application of its unbundling requirements based on service, geographic, facility, customer or other factors. In addition, the FCC seeks comment on whether to retain, modify or eliminate its existing definitions and requirements for network elements. The FCC also seeks comment on the role of state commissions and whether to retain or modify a periodic review cycle for UNE reevaluation

The Illinois Commerce Commission ("ICC") recognizes the need for this proceeding, and commends the Commission for identifying this need and seeking further input from the states. On October 24, 2001, the ICC initiated a 271 proceeding[1] the scope of which is to determine whether Ameritech Illinois currently meets all of its obligations required for Section 271 approval. The ICC's 271 proceeding is currently in the pre-hearing stage,

[1] *See*, Initiating Order, *Investigation concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996,* ICC Docket No. 01-0662,

with discovery having been completed and testimony filed by all interested parties. Since it is still early in the process, the ICC has not yet had the opportunity to decide these issues but will eventually be evaluating and ruling on all the pertinent issues relating to 271 approval. Due to the overlap of key issues in the Illinois 271 proceeding and this proceeding initiated by the FCC, the ICC must respectfully decline to comment on certain substantive issues in the NPRM.

Status of Competition in Illinois

The ICC is currently evaluating competition in Illinois. Public Act 92-0022, signed into law by Governor George Ryan on June 28, 2001, expanded the ICC's charge to monitor and analyze the levels of competition in the Illinois local exchange and broadband markets. Pursuant to amendments made to Section 13-407 of the Public Utilities Act (220 ILCS 5/13-407), the ICC was granted increased data collection authority in order to fulfill its duties. To this end, the ICC submitted a detailed data request to telecommunications carriers seeking information that will allow the ICC to accurately describe the status of local markets in Illinois and the various modes of competition employed (resale, UNE-based, facilities-based, etc.). The deadline for responses from carriers was March 1, 2002, and ICC Staff is currently processing the data. To the extent that the ICC is able to derive non-proprietary information pertinent to the NPRM from the aforementioned data collection process, we will provide said information in the reply phase of this proceeding.

Specific Network Elements

The Commission believes that it is premature at this time to consider changes to both the federal list of UNEs and the application of the FCC's unbundling rules. Therefore, the ICC urges the FCC to retain all currently available UNEs and current unbundling rules and to refer all proposed reductions to a Federal/State joint conference before a final decision is made. Removing UNEs from the list and revising unbundling rules at this point would undermine the competitive progress the ICC has achieved to date and frustrate the continuing efforts to foster a competitive local exchange market in Illinois.

For instance, as a condition of merger approval in Illinois, the ICC required Ameritech-Illinois to provide the same shared transport offering that SWBT provides in Texas. Therefore, a change in policy at the FCC with regard to interoffice facilities could have a dramatic impact on the pro-competitive efforts of the ICC in Illinois.

Additionally, from its experience in ruling on numerous 271 applications over the past two years the Commission is well aware that such applications have been approved on the basis that the petitioning RBOC has sufficiently opened its local market to competitors, in accordance with the 14-point checklist embodied in Section 271(c)(2)(B) of the Telecommunications Act of 1996. The ICC is deeply concerned that one of those checklist items, nondiscriminatory access to network elements, may be materially changed should the FCC amend the federal list of UNEs currently required. Such an amendment could change the competitive landscape for states in which an RBOC has

been granted 271 approval as well as those that have not received approval to date (as is the case in Illinois). The ICC submits that it is counter-productive to provide opportunities for RBOCs to strengthen their market presence in the combined local/long-distance telecommunications market via 271 approval, while removing CLECs' competitive options in the same market. This action would frustrate the carefully crafted incentives contained in the Telecommunications Act of 1996 and would therefore be contrary to the intent of Congress. This unfortunate outcome could be avoided by ensuring that long distance providers can use UNEs according to the provisions of Section 251(c)(3)[2] to offer the same bundles of local and long distance services that the ILECs offer to their customers.

Revisions to the federal list or changes to the application of the FCC's unbundling rules may be appropriate at some point in the future. Therefore, the ICC does not object to revisiting these issues in regularly scheduled reviews. The ICC, however, firmly opposes any action which would weaken currently existing unbundling requirements as premature and potentially damaging to the competitive market that has developed thus far. Furthermore, notwithstanding any revisions that the FCC may make to the federal list of UNEs, the ICC believes that States must continue to have the power to implement unbundling rules within the broader guidelines established by the FCC. Therefore, the ICC respectfully requests that the FCC take no action that may weaken the authority of individual states as it pertains to unbundling rules and to adopt a Federal/State Joint Conference approach to any proposed changes to Federal unbundling requirements.

The Role of the States in Encouraging Competition Should not be Reduced

Notwithstanding any revisions that the FCC may make to the federal list of UNEs, States must continue to have the power to implement unbundling rules within the broader guidelines established by the FCC. Despite the benefits that a nationwide list of UNEs can provide competitors, a "one size fits all" approach is inappropriate and could undermine rather than enhance the development of competition. For example, SBC Communications has offered the Unbundled Network Elements – Platform ("UNE-P") in Texas longer than in Illinois. Consequently, national elimination of a platform element such as shared transport will necessarily have a different effect on the Illinois market than it will on the Texas market. Competitive inroads made by carriers relying on UNE-P will have had less opportunity to flourish in Illinois than in Texas.

The unique position of State Public Utility Commissions grants them a singular expertise to evaluate the status of competition in their respective jurisdictions as well as the availability of network elements to competitive carriers within their states. Indeed, Congress structured the Telecommunications Act of 1996 such that the FCC may take advantage of the expertise of State Commissions in gathering and evaluating evidence when ILECs submit Section 271 applications. This same expertise, the unique product of the State Commission's traditional regulatory responsibilities as accentuated in their current roles in implementing the interconnection provisions integral to the success of the 1996 Act, place States in roles appropriately situated to implementing the FCC's

[2] 47 U.S.C. § 251(c)(3).

unbundling rules as they apply to individual elements.

The ICC firmly believes that States must continue to have the power to take proactive measures when barriers to entry frustrate the pro-competitive provisions of the 1996 Act. Recent determinations of the Illinois General Assembly, which resulted in the passage of Public Act 92-0022, signed into law on June 28, 2001, highlight this reality. The Illinois General Assembly passed a new telecommunications law, one which includes pro-competitive provisions and increased enforcement authority for the ICC. States must continue to have the authority to respond to developments in the local marketplace through State Commission and State Legislative actions.

"At a Minimum" Statutory Analysis

The competitive obligations imposed on ILECs by Section 251(c)(3)[3] should not be reduced in order to encourage deployment of advanced services networks. Competition and innovation are complementary. The ICC believes that successful innovation offers the reward of monopoly rents, which can be a powerful incentive to innovate. Firms currently dominant in their markets are important innovators. Their incentives for innovation, however, are often dampened by the fact that introduction of their innovations cannibalizes their existing business (e.g., the introduction of DSL service on past ISDN and T1 offerings). Therefore, it is important to encourage new entrants and other competitors to innovate. With the powerful network externalities in the telecommunications market, encouraging such competitors to innovate requires permitting these competitors access to the dominant carrier's network. Section 251(c)(3)[4] opens one important avenue for CLECs to gain such access --- an avenue that should not be closed. While recognizing that reducing or barring CLEC access to ILEC facilities capable of supporting advanced services may encourage slightly quicker deployment of these facilities, the ICC believes that such essentially short-term gains will likely be much less significant than the long-term losses associated with diminished incentives for innovation on the part of both ILECs and CLECs.

A statement reflecting the FCC's intent to enforce Section 251(c)(3)[5] to the fullest extent of the law, will encourage rather than discourage ILECs from deploying advanced networks. SBC has made no secret of its intentions of withholding deployment of its network upgrade dubbed "Project Pronto", as it relates to advanced services, unless it gains what it perceives to be favorable regulatory treatment for this upgrade. The FCC should therefore make clear its intention to require unbundling of local loop facilities whether or not they are used for advanced services or voice services (an approach supported by the ICC). While the advanced technology underlying Project Pronto is not a technology unique to ILECs, in view of their current dominant position, they hold a competitive advantage in the provision of DSL services. Strengthening implementation of Section 251(c)(3)[6] will reduce this competitive advantage. In acting to further enable

[3] 47 U.S.C. §251(c)(3).
[4] *Id.*
[5] *Id.*
[6] *Id.*

competitors to deploy advanced services facilities, the FCC will ensure that the market, rather than the ILECs, will dictate deployment of advanced services.

In attempting to speed the pace of competitive development in the advanced services market, the Illinois General Assembly, in PA 92-0022, included a provision, which mandates that "every Incumbent Local Exchange Carrier shall offer or provide advanced telecommunications services to not less than 80% of its customers by January 1, 2005."[7] Thus, the ICC submits that there is no need to stimulate deployment of advanced services networks in Illinois through the relaxation of unbundling requirements; the Illinois General Assembly has now mandated such deployment. Moreover, this statutory requirement on ILECs to deploy the facilities, combined with unbundling requirements, will ensure even greater competition, availability, choice and innovation in Illinois broadband markets. The FCC, therefore, should not alter the unbundling requirements imposed on ILEC broadband facilities.

A More Granular Statutory Analysis is Inappropriate

Current restrictions imposed on carrier use of UNEs significantly reduce the feasibility of UNE based entry. An example of the negative impact that such restrictions have on the competitive market is the prohibition on commingling UNEs with tariffed services. This prohibition permits ILECs to provide discriminatory provision of network elements. This problem arises because while an ILEC may transport interexchange access, local, ISP-bound, and all other forms of traffic jointly over its high capacity transport facilities, CLECs employing the ILECS networks are often forced to establish separate facilities for these different traffic types, thereby increasing their cost of provision above that of the ILEC. The FCC should not consider the application of any of its unbundling requirements based on service, geographic, facility, customer or other factors.

Conclusion

The ICC respectfully urges the Commission to retain all currently available UNEs and current unbundling rules and to refer all proposed reductions to a Federal/State joint conference before a final decision is made. In addition, we request that the FCC take no action that may weaken the authority of individual states as it pertains to unbundling rules. Finally, we urge the FCC to avoid any action that would attempt to stimulate deployment of advanced services networks in Illinois through the relaxation of unbundling requirements.

[7] 220 ILCS 5/13-517(a).

Respectfully Submitted,

/s/

Myra Karegianes
General Counsel and
Special Assistant Attorney General

John P. Kelliher
Michael Lannon
Special Assistant Attorneys General
160 N. LaSalle, Suite C-800
Chicago, Illinois 60601
(312) 793-2877

Counsel for the
Illinois Commerce Commission

cc:

Hon. Chairman Michael K. Powell
Hon. Comm. Kathleen Q. Abernathy
Hon. Comm. Michael J. Copps
Hon. Comm. Kevin J. Martin